STATE OF MICHIGAN

COURT OF APPEALS

MEYER & ANNA PRENTIS FAMILY FOUNDATION, INC.,

Plaintiff/Appellant-Cross Appellee,

v

BARBARA ANN KARMANOS CANCER INSTITUTE, f/k/a MICHIGAN CANCER FOUNDATION, f/k/a COMPREHENSIVE CANCER CENTER OF METRO DETROIT,

Defendant/Appellee-Cross Appellant,

and

HONIGMAN, MILLER, SCHWARTZ AND COHN,

Defendant.

UNPUBLISHED
February 6, 2007

No. 262001
Oakland Circuit Court
LC No. 2000-024848-CK

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting in part defendant Barbara Ann Karmanos Cancer Institute's (hereinafter defendant Institute) post-judgment motion for case evaluation sanctions under MCR 2.403(O). Defendant Institute cross-appeals from the same order, arguing that it is entitled to additional case evaluation sanctions as the prevailing party as to all of plaintiff's claims after appellate review, and that the trial court erred in its determination of the amount of attorney fees awarded to it. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.[1]

[1] This case has been before the Court numerous times (Docket Nos. 234963, 244593, 246451, (continued…)

I. FACTS

Plaintiff and defendant Institute entered into a contract in 1985, which provided that in recognition of an endowment set up by plaintiff and held by Wayne State University, defendant Institute (then operating under a different name) would be renamed the "Meyer L. Prentis Comprehensive Cancer Center of Metro Detroit." Plaintiff alleged that defendant Institute breached this contract in 1994 after merging with The Michigan Cancer Foundation, when it allowed the surviving consolidated corporation to exist as The Michigan Cancer Foundation. Plaintiff alleged that the contract was breached a second time in 1995, when The Michigan Cancer Foundation, after receiving a $15 million contribution, changed its name to the Barbara Ann Karmanos Cancer Institute.

Plaintiff filed a complaint in the circuit court seeking both damages at law and equitable remedies associated with defendant Institute's purported breach of contract. Before trial, the parties submitted the matter to case evaluation. The unanimous panel suggested an award of $2,000 payable to plaintiff by defendant Institute, which defendant Institute accepted and plaintiff rejected.

Thereafter, the trial court determined that plaintiff's claims should be tried in a bifurcated proceeding, with an initial bench trial on the claims for equitable relief, followed by a jury trial on the legal claims for money damages. After proofs were presented at the bench trial, defendant Institute moved to dismiss plaintiff's entire complaint, arguing that plaintiff lacked standing to enforce the terms of the charitable trust. The trial court granted defendant Institute's motion, but reinstated the matter upon reconsideration. After the bench trial, the lower court found that defendant had breached the 1985 agreement and ordered equitable relief in the form of specific performance of the contract, i.e., naming defendant center the Meyer L. Prentis Comprehensive Cancer Center of Metropolitan Detroit.

Before the jury trial on plaintiff's legal claim for consequential damages, defendant Institute again moved for summary disposition, arguing that the naming opportunity contained in the 1985 agreement has no value and that any consequential damages based thereon would be speculative. The trial court agreed, and granted defendant's motion under MCR 2.116(C)(8) and (10), thereby limiting plaintiff's relief to the equitable remedy discussed above.

An appeal ensued, and in a published decision, this Court determined that the trial court erred in concluding that defendant Institute breached the contract. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 59; 698 NW2d 900 (2005). This Court also found that the trial court had erred in denying defendant Institute's motion to

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(…continued)

249438, and 249471). Docket Nos. 234963, 244593, and 246451 involved applications for leave that were denied by the Court. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, unpublished orders of the Court of Appeals, entered August 9, 2001, February 25, 2003, and May 5, 2003 (Docket Nos. 234963, 244593, 246451). This Court consolidated Docket Nos. 249438 and 249471 on July 31, 2003, and a published opinion was issued. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39; 698 NW2d 900 (2005).

dismiss following the bench trial because plaintiff lacked standing and because no consideration existed for the naming provision of the contract. *Id.* at 56-57. This Court also denied defendant law firm's request for sanctions. *Id.* at 60.

On July 2, 2003, defendant Institute moved the trial court for case evaluation sanctions under MCR 2.403(O). The trial court granted defendant Institute's motion with respect to plaintiff's legal claims, but refused to award sanctions for plaintiff's equitable claims.

A hearing was held on June 2, 2004, to address the amount of attorney fees to be awarded as case evaluation sanctions. Defendant requested $110,819.50. Argument was had on the reasonableness of some of the hourly rates charged, as well as the total amount in light of the time period in issue, and the trial court concluded that $55,000.00 was a reasonable award.

II. CASE EVALUATION SANCTIONS

The first issue on appeal for both plaintiff and defendant Institute concerns the lower court's award of costs under MCR 2.403(O). Plaintiff argues that it was the prevailing party in the case because the trial court found that it was entitled to specific performance of the contract allegedly breached by defendant Institute. Therefore, according to plaintiff, the lower court erred in awarding actual costs to defendant Institute. In contrast, defendant Institute argues that it is entitled to case evaluation sanctions with respect to defending against all of plaintiff's claims because this Court subsequently overturned the lower court's grant of equitable relief to plaintiff, *Prentis*, *supra*, and because it had successfully moved for summary disposition under MCR 2.116(C)(8) and (C)(10) as to the rest of plaintiff's claims.

A. Standard of Review

We review de novo the lower court's interpretation and application of a court rule. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001). We also review de novo the lower court's determination of which party prevailed in an action. *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 489; 717 NW2d 341 (2006). We review for abuse of discretion the trial court's ruling on a motion for an award of costs to a prevailing party. *Fansler v Richardson*, 266 Mich App 123, 126; 698 NW2d 916 (2005).

B. Analysis

MCR 2.403(O)(1) permits the prevailing party in an action to recover sanctions from an opposing party who has rejected a case evaluation award. Under the rule, awardable actual costs include those costs that are taxable in any civil action and a reasonable attorney fee. MCR 2.403(O)(6)(a), (b). Finding that defendant Institute was entitled to actual costs and a reasonable attorney fee under MCR 2.625 and MCR 2.403(O), the lower court reasoned as follows:

> The Court has considered the arguments of the parties and finds, pursuant to MCR 2.625(B)(2), that this was an action involving several counts. The Plaintiff prevailed in its cause of action for equitable relief but the Defendant prevailed with regard to the Plaintiff's cause of action for money damages.

> Thus, as the prevailing party with regard to the Plaintiff's cause of action for money damages, the Defendant is entitled to reasonable attorney fees and taxable costs associated with that cause of action. However, no fees will be allowed which are associated with the trial on the Plaintiff's equitable cause of action since the Plaintiff was the prevailing party at trial.

The parties do not dispute that this Court subsequently overturned the lower court's decision as to plaintiff's equitable remedy and that our Supreme Court has denied plaintiff's application for leave to appeal from this ruling. Moreover, the record shows that, cognizant that defendant Institute's appeal was pending, the lower court waited until this Court had issued its decision before issuing its opinion and order. Therefore, at the time that the trial court issued its order granting in part defendant Institute's motion for case evaluation sanctions, defendant Institute was the prevailing party as to all of plaintiff's claims—both legal and equitable—and case evaluation sanctions were appropriate. See *Keiser v Allstate Ins Co*, 195 Mich App 369, 374-375; 491 NW2d 581 (1992). Moreover, because defendant Institute is the prevailing party as to all of plaintiff's claims, the lower court erred in denying costs associated with plaintiff's equitable claims. Therefore, we find that defendant Institute is entitled to case evaluation sanctions associated with defending against all of plaintiff's claims because it was the prevailing party after appellate review.

III. INTEREST OF JUSTICE EXCEPTION

Next, plaintiff argues that the lower court abused its discretion in denying plaintiff's request to apply the interest of justice exception to the case evaluation sanction rule. We disagree.

A. Standard of Review

We review a trial court's decision whether to apply the interest of justice exception found in MCR 2.403(O)(11) for abuse of discretion. *Haliw v Sterling Heights* (*On Remand*), 266 Mich App 444, 446; 702 NW2d 637 (2005).

B. Analysis

MCR 2.403(O)(11) provides that "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." MCR 2.403(O)(2)(c) defines as a verdict "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." This Court has noted that the interest of justice exception found in MCR 2.403(O)(11) has been interpreted in the context of the analogous offer of judgment rule, MCR 2.405(D), because "'both . . . serve identical purposes of deterring protracted litigation and encouraging settlement.'" *Haliw* (*On Remand*), *supra* at 448, quoting *Haliw v Sterling Heights*, 257 Mich App 689, 706-707; 669 NW2d 563 (2003), rev'd 471 Mich 700 (2005).

In the context of the rule's purpose and the fact that the interest of justice provision is an exception to a general rule, we have previously held that, "'[a]bsent unusual circumstances,' the 'interest of justice' does not preclude an award of attorney fees under MCR 2.405." *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996). Moreover, we have noted that

"[f]actors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous 'are too common' to constitute the unusual circumstances encompassed by the 'interest of justice' exception." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 391; 689 NW2d 145 (2004), quoting *Luidens*, *supra* at 34-35. However, if an offer is made out of "gamesmanship . . . rather than a sincere effort at negotiation," or when the litigation of the case affects the public interest or is a case of first impression, the exception may be applicable. *Luidens*, *supra* at 35; see also *Derderian*, *supra* at 391.

In this case, the unusual circumstances necessary to invoke the interest of justice exception are not present. Therefore, the lower court did not abuse its discretion in denying plaintiff's request to apply the exception.

Plaintiff argues that the case involved an issue of first impression. However, this Court ultimately decided that the trial court had erred in denying defendant Institute's motion to dismiss because plaintiff, as the settlor of a charitable trust, lacked standing to bring this suit, and because no consideration existed for the naming provision in the contract between defendant Institute and plaintiff. *Prentis Foundation*, *supra* at 56-57. These are not issues of first impression under Michigan law. See, e.g., *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002); *Knights of Equity Mem Scholarships Comm v Univ of Detroit*, 359 Mich 235; 102 NW2d 463 (1960).

Plaintiff also argues that the issue of standing did not arise until shortly before closing arguments and that there was a dispute between two trial judges as to whether plaintiff's claims for restitution were to be heard before a jury. We find that these matters are "too common" under Michigan case law to constitute unusual circumstances. Although the misconduct of a prevailing party may be an unusual circumstance sufficient to trigger the "interest of justice" exception, *Haliw* (*On Remand*), *supra* at 449, plaintiff has failed to allege that the standing issues arose late because of defendant Institute's improper conduct. Moreover, any disagreement between two judges as to the restitution issue constitutes "factors normally present in litigation," which this Court has found is "insufficient, without more, to justify not imposing sanctions in the interest of justice." *Id.* at 448.

IV. TAXATION OF COSTS

Plaintiff further argues that defendant Institute's request for case evaluation sanctions should have failed because it did not follow the procedures outlined in MCR 2.625 for taxing costs. We disagree.

A. Standard of Review

Again, we review de novo the interpretation and application of a court rule. *Marketos*, *supra* at 412.

B. Analysis

Although both MCR 2.403 and MCR 2.625 allow a party to recover the taxable costs in a civil action, the rules are not interchangeable. See, e.g., *Badiee v Brighton Area Schools*, 265

Mich App 343, 375-376; 695 NW2d 521 (2005) (discussing the differing requirements of the rules concerning the filing of bills of costs). While MCR 2.625(F) specifies a procedure for the taxation of costs to prevailing parties in civil actions, defendant Institute did not file its motion under this rule. Rather, defendant Institute filed its motion pursuant to MCR 2.403, which governs case evaluation sanctions and which is applicable to the circumstances of this case. Therefore, the plain language of MCR 2.403 governs defendant Institute's motion.[2]

MCR 2.403(O)(8) states, "A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment." The order granting defendant Institute's motion for summary disposition was entered on June 4, 2003. Defendant Institute filed and served upon plaintiff its motion for case evaluations sanctions on July 2, 2003—within 28 days after the entry of the judgment. Therefore, defendant Institute fulfilled the timing requirement of MCR 2.403, and the trial court did not err in awarding costs and fees to defendant Institute under the rule.

V. SUBJECT-MATTER JURISDICTION

We also reject plaintiff's argument that the trial court lacked subject-matter jurisdiction over defendant Institute's motion for case evaluation sanctions at the time that it was heard and granted.

A. Standard of Review

We review de novo the determination of whether a lower court has subject-matter jurisdiction. *Davis v Dep't of Corrections*, 251 Mich App 372, 374; 651 NW2d 286 (2002).

B. Analysis

MCR 7.208(I) provides as follows: "The trial court may rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless the Court of Appeals orders otherwise." The staff comment to the 1999 amendment that added subrule (I) clearly indicates that a trial court has jurisdiction to award sanctions regardless of whether an appeal is pending in this Court:

> The amendment to MCR 7.208 deals with the issue regarding the relationship of appeals and orders awarding or denying attorney fees and costs. The amendment concerns the authority of the trial court to rule on requests for sanctions when an appeal has been taken. See *Co-Jo, Inc v Strand*, 226 Mich App 108; 572 NW2d 251 (1997). New MCR 7.208(I) provides that the trial court has the authority to rule on such requests despite the pendency of an appeal.

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[2] In its order granting defendant Institute's motion for attorney fees and costs, the lower court stated that the motion was filed under both MCR 2.403 and MCR 2.625(A). However, an examination of the motion indicates that it was only filed under MCR 2.403.

MCR 7.208(I) was effective February 1, 2000. Defendant Institute filed its motion for costs and fees under MCR 2.403 on July 2, 2003. Accordingly, the trial court had jurisdiction to award case evaluation sanctions.

VI. ATTORNEY FEES

Defendant Institute's remaining argument on appeal is that the trial court abused its discretion when it awarded only half of the attorney fees that it had requested in connection with its defense against plaintiff's legal claims. We disagree. However, because defendant Institute was the prevailing party after appellate review as to all of plaintiff's claims, we conclude that the lower court erred in denying defendant Institute's request for attorney's fees associated with defending against plaintiff's equitable claims.

A. Standard of Review

We review an award of attorney fees under MCR 2.403(O) for an abuse of discretion. *Cleary v Turning Point*, 203 Mich App 208, 211; 512 NW2d 9 (1993).

B. Analysis

While there is no precise formula for computing the reasonableness of an attorney fee, *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 430; 552 NW2d 466 (1996), this Court has enumerated the following non-exhaustive list of factors that a trial court should take into consideration in determining the reasonableness of a fee:

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [*Id.* (citation omitted).]

The trial court is not required to detail its findings relative to each specific factor considered, so long as the record evidences the fact that the court considered. *Id.* Moreover, reasonable fees are not equivalent to the actual fees charged. *Cleary*, *supra* at 212.

In this case, the trial court did not abuse its discretion when it reduced the amount of attorney fees awarded defendant Institute to less than half of that requested. The record shows that the trial court considered the appropriate factors when making its decision. Further, the lower court's decision was reasonable because there were only four motions considered by the trial court and only four hearings actually held after the case evaluation, and because the matter was dismissed by summary disposition approximately two weeks before the scheduled trial. Under these circumstances, the court's decision was within a range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Again however, because defendant Institute was the prevailing party as to all of plaintiff's claims after appellate review, the trial court erred in denying defendant Institute's request for attorney fees and costs associated with defending against plaintiff's equitable claims.

Affirmed in part, reversed in part, and remanded for the lower court to recalculate the amount of case evaluation sanctions awarded to defendant Institute to include costs associated with defending against all of plaintiff's ultimately unsuccessful claims. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette